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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

CALVIN SKELTON,  
  
                    Petitioner,  
  
          v.  
  
FEDERAL BUREAU OF PRISONS/FCI  
MENDOTA,  
  
                    Respondent.

Case No. 1:14-cv-01314-SAB-HC  
  
ORDER TO SHOW CAUSE  
  
ORDER GRANTING PETITIONER LEAVE  
TO AMEND PETITION TO NAME A  
PROPER RESPONDENT  
  
(ECF No. 1)

Petitioner is a federal prisoner who is proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging the execution of his federal sentence. Petitioner consented to the jurisdiction of the United States Magistrate judge pursuant to 28 U.S.C. § 636(c)(1).

On August 22, 2014, Petitioner filed the instant petition for writ of habeas corpus. He raises the following grounds for relief: (1) Defense counsel and the prosecutor conspired and mislead the court during sentencing; (2) Misrepresentation by prosecutor that Petitioner was to remain in Federal custody and receive all jail credits; (3) Ineffective assistance of counsel at sentencing for failure to request that Petitioner’s federal case run concurrent to his Montana state case; and (4) Ineffective assistance of counsel for failure to timely file a motion to amend Petitioner’s sentence. (Pet. at 7-9). Petitioner requests that this Court amend his federal sentence

1 to reflect a start date of August 12, 2009, and award him credit for time served for the period of  
2 time between August 12, 2009, and December 13, 2011. (Pet. at 9).

3 **I.**

4 **DISCUSSION**

5 **A. Jurisdiction**

6 Writ of habeas corpus relief extends to a person in custody under the authority of the  
7 United States. See 28 U.S.C. § 2241. While a federal prisoner who wishes to challenge the  
8 validity or constitutionality of his conviction must bring a petition for writ of habeas corpus  
9 pursuant to 28 U.S.C. § 2255, a petitioner challenging the manner, location, or conditions of that  
10 sentence's execution must bring a petition for writ of habeas corpus under 28 U.S.C. § 2241.  
11 See, e.g., Brown v. United States, 610 F.2d 672, 677 (9th Cir. 1990); Capaldi v. Pontesso, 135  
12 F.3d 1122, 1123 (6th Cir. 1998); Kingsley v. Bureau of Prisons, 937 F.2d 26, 30 n.5 (2nd Cir.  
13 1991). To receive relief under 28 U.S.C. § 2241, a petitioner in federal custody must show that  
14 his sentence is being executed in an illegal, but not necessarily unconstitutional, manner. See,  
15 e.g., Clark v. Floyd, 80 F.3d 371, 372, 374 (9th Cir. 1995) (contending time spent in state  
16 custody should be credited toward federal custody); Jalili, 925 F.2d at 893-94 (asserting  
17 petitioner should be housed at a community treatment center); Barden v. Keohane, 921 F.2d 476,  
18 479 (3rd Cir. 1990) (arguing Bureau of Prisons erred in determining whether petitioner could  
19 receive credit for time spent in state custody); Brown, 610 F.2d at 677 (challenging content of  
20 inaccurate pre-sentence report used to deny parole).

21 In this case, because Petitioner challenges the way the Bureau of Prisons (BOP)  
22 calculated his credits, he is challenging the execution of his sentence. Clark, 80 F.3d at 372, 374.  
23 Therefore, the Court has jurisdiction to consider the petition pursuant to 28 U.S.C. § 2241.

24 **B. Venue**

25 A petitioner filing a petition for writ of habeas corpus under 28 U.S.C. § 2241 must file  
26 the petition in the judicial district of the petitioner's custodian. Brown, 610 F.2d at 677. At the  
27 time of filing, Petitioner was in the custody of the Bureau of Prisons (BOP) at FCI Mendota at  
28 Mendota, California, which is located within the jurisdiction of this Court. 28 U.S.C. § 2254(a);

1 2241(d). Therefore, venue is proper in this Court.

2 C. Proper Respondent

3 For a court to hear a petition for writ of habeas corpus, it must have jurisdiction over the  
4 prisoner or his custodian. United States v. Giddings, 740 F.2d 770, 772 (9th Cir.1984). A failure  
5 to name the proper respondent deprives a habeas court of personal jurisdiction. Brittingham v.  
6 United States, 982 F.2d 378, 379 (9th Cir. 1992); Dunne v. Henman, 875 F.2d 244, 249 (9th  
7 Cir.1989). The proper respondent in a federal habeas corpus petition is the petitioner's  
8 "immediate custodian." Brittingham, 982 F.2d at 379 (quoting Demjanjuk v. Meese, 784 F.2d  
9 1114, 1115 (D.C.Cir.1986) (Bork, J., in chambers)). The custodian "is the person having a day-  
10 to-day control over the prisoner. That person is the only one who can produce 'the body' of the  
11 petitioner." Brittingham, 982 F.2d at 379 (quoting Guerra v. Meese, 786 F.2d 414, 416 (D.C.  
12 Cir.1986) (Parole Commission is not custodian despite its power to release petitioner)).  
13 Normally, the custodian of an incarcerated petitioner is the warden of the prison in which the  
14 petitioner is incarcerated because the warden has "day-to-day control over" the petitioner.  
15 Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992); see also Stanley v. California  
16 Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994).

17 Petitioner names "Federal Bureau of Prisons/FCI Mendota" as the respondent in this  
18 matter. At this time, Paul Copenhaver is the warden of that institution. Because Petitioner did  
19 not name his immediate custodian as the respondent in this matter, this Court is without personal  
20 jurisdiction, and the petition must be dismissed.

21 However, the Court will give Petitioner the opportunity to cure the defect by amending  
22 the petition to name a proper respondent. See West v. Louisiana, 478 F.2d 1026, 1029 (5th  
23 Cir.1973), *vacated in part on other grounds*, 510 F.2d 363 (5th Cir.1975) (en banc) (allowing  
24 petitioner to amend petition to name proper respondent); Ashley v. State of Washington, 394  
25 F.2d 125 (9th Cir. 1968) (same). In the interest of judicial economy, Petitioner need not file an  
26 amended petition. Instead, Petitioner may file a motion entitled "Motion to Amend the Petition  
27 to Name a Proper Respondent" wherein Petitioner may name the proper respondent in this  
28 action.

1           D. Exhaustion

2           A petitioner who is in federal custody and wishes to seek habeas relief pursuant to 28  
3 U.S.C. § 2241 must first exhaust available administrative and judicial remedies. Brown v. Rison,  
4 895 F.2d 533, 535 (9th Cir. 1990); Chua Han Mow v. United States, 730 F.2d 1308, 1313 (9th  
5 Cir. 1984). A prisoner may bring a habeas action challenging the BOP's execution of his  
6 sentence only if he first exhausts all of his administrative remedies by presenting his claim to the  
7 BOP. Martinez v. Roberts, 804 F.2d 570, 571 (9th Cir. 1986); Chua Han Mow, 730 F.2d at  
8 1313. In Ruwiwat v. Smith, 701 F.2d 844, 845 (9th Cir.1983) (per curiam), the Ninth Circuit  
9 explained why a petitioner must first exhaust his administrative remedies before filing for habeas  
10 relief: "The requirement of exhaustion of remedies will aid judicial review by allowing the  
11 appropriate development of a factual record in an expert forum; conserve the court's time  
12 because of the possibility that the relief applied for may be granted at the administrative level;  
13 and allow the administrative agency an opportunity to correct errors occurring in the course of  
14 administrative proceedings. See also Chua Hah Mow, 730 F.2d at 1313.

15           However, the exhaustion requirement was judicially created; it is not a statutory  
16 requirement. Chua Han Mow, 730 F.2d at 1313; Montgomery v. Rumsfeld, 572 F.2d 250, 252  
17 (9th Cir. 1978). Because exhaustion is not required by statute, it is not jurisdictional. Morrison-  
18 Knudsen Co., Inc. v. CHG Int'l, Inc., 811 F.2d 1209, 1223 (9th Cir. 1987), *cert. dismissed*, 488  
19 U.S. 935 (1988); Montgomery, 572 F.2d at 252. "Where exhaustion of administrative remedies  
20 is not jurisdictional, the district court must determine whether to excuse the faulty exhaustion  
21 and reach the merits, or require the petitioner to exhaust his administrative remedies before  
22 proceeding in court." Brown, 895 F.2d at 535.

23           The Bureau of Prisons has established an administrative remedy procedure governing  
24 prisoner complaints. Under BOP procedures, Petitioner can raise claims that his federal and state  
25 sentences should run concurrently and that he should receive jail time credits. See BOP Program  
26 Statement 5160.05, at ¶ (9)(b)(4) (2003). The procedure is set forth at 28 C.F.R. §§ 542.10 et.  
27 seq. First, an inmate must attempt to resolve the issue informally by presenting it to staff before  
28 submitting a Request for Administrative Remedy. 28 C.F.R. § 542.13. If dissatisfied with the

1 response, the prisoner may proceed with the formal filing of an Administrative Remedy Request.  
2 28 C.F.R. § 542.14. Upon denial by the warden of the institution, the prisoner may appeal the  
3 decision by filing a complaint with the Regional Director of the Bureau of Prisons. 28 C.F.R. §  
4 542.15. The Regional Director’s decision may be appealed to the General Counsel in  
5 Washington, D.C. Id. Appeal to the General Counsel is the final step in the administrative  
6 remedy process. Id.

7 Here, it appears that Petitioner has failed to exhaust his administrative remedies within  
8 the BOP. On July 14, 2011, the Montana District Court sentenced Petitioner to 144 months’  
9 imprisonment. (Pet., ECF No. 1). Petitioner did not appeal his conviction or sentence. On  
10 September 13, 2011, Petitioner, through counsel, made a motion to amend the federal sentence,  
11 which was denied on September 16, 2011. On December 13, 2011, Petitioner was paroled from  
12 Montana state custody, and was delivered to federal custody. It appears that Petitioner has not  
13 made any formal requests of the BOP. Petitioner states that he “contacted my case manager, Mr.  
14 Wynn, and talked to him at length about my jail credit issues and informed him of my lawyer’s  
15 intent to contact him in reference to this issue. He proceeded to inform me that he was not  
16 responsible for my time credit computation and that my lawyer needs to contact a Mr. Hoffman.”  
17 (Mem.<sup>1</sup> at 3-4). Petitioner states that he “was informed by Mr. Hoffman that the way my  
18 sentence was worded, I would not be receiving any jail time credit.” Id. Therefore, it appears  
19 that Petitioner has only concluded the informal resolution, and has not appealed further. Thus,  
20 Petitioner has not exhausted his administrative remedies.

21 **II.**

22 **ORDER**

23  
24 Accordingly, IT IS HEREBY ORDERED:

- 25 1) Petitioner is ORDERED TO SHOW CAUSE within thirty (30) days of the date of  
26 service of this Order why the petition should not be dismissed for Petitioner’s failure  
27 to exhaust administrative remedies.

28 <sup>1</sup> “Mem.” refers to the memorandum that is attached to Petitioner’s petition for writ of habeas corpus.

1 2) Petitioner is GRANTED leave to file a motion to amend the petition to name a proper  
2 respondent within thirty (30) days of the date of service of this Order.

3 Petitioner is forewarned that failure to follow this order will result in dismissal of the  
4 petition pursuant to Fed. R. Civil Proc. § 41(b) (A petitioner's failure to prosecute or to comply  
5 with a court order may result in a dismissal of the action, and the dismissal operates as an  
6 adjudication on the merits).

7  
8 IT IS SO ORDERED.

9 Dated: October 21, 2014

  
UNITED STATES MAGISTRATE JUDGE